

**BABOOA S. K. v INDEPENDENT COMMISSION  
AGAINST CORRUPTION & ORS**

**2024 SCJ 408**

**Record No: SCR 9214**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:**

**Sanjiv Kumar Babooa**

**Appellant**

**v**

- 1. Independent Commission Against Corruption**
- 2. The Director of Public Prosecutions**
- 3. The State**

**Respondents**

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**JUDGMENT**

1. The appellant was charged before the Intermediate Court for the offence of Public Official using his office for gratification under seven counts of the information in breach of section 7(1) of the Prevention of Corruption Act 2002 (POCA). He pleaded not guilty to the said counts. He was found guilty as charged under counts 1, 2, 4 and 6 and counts 3, 5 and 7 were dismissed.
2. On 19 April 2018, the Court sentenced the appellant to undergo a term of imprisonment of 12 months in respect of each count namely 1, 2, 4 and 6 and to pay Rs 500 as costs and suspended the term of imprisonment pending Community Service Suitability Report. On 10 May 2018 being satisfied of the said report, the learned Magistrate suspended the sentence of imprisonment and imposed a Community Service Order requiring the appellant to perform unpaid work in the open for 180 hours as from 23 June 2018.
3. There were originally 9 grounds of appeal on conviction and 1 ground of appeal on sentence and thereafter the appellant filed an additional ground of appeal against conviction and sentence. On 2 July 2020, learned Counsel for the appellant dropped

the additional ground together with grounds Nos.1 to 4 and maintained only grounds 5 to 9 which are reproduced as follows:-

5. *Because the Learned Magistrate erred in law in not finding that the element of "he, or a relative or associate of his" under section 7(2) of the Prevention of Corruption Act has not been proven in relation to counts 1, 2, 4 and 6 of the information.*
6. *Because the Learned Magistrate erred in law in not finding that the element of "has a direct or indirect interest" under Section 7(2) of the Preventing of Corruption Act has not been proven in relation to counts 1, 2, 4 and 6 of the information.*
7. *Because the testimony of Mr. Fokeer (witness No. 3) on which the Learned Magistrate relied on heavily in reaching her decisions to convict the Appellant under count 1, 2, 4 and 6 of the information contained numerous serious inconsistencies that were in direct contradiction with the testimony of (i) Ms Chan Sin (witness No. 14) who was another witness for prosecution itself, and (ii) Mrs Sudoollah (witness for the defence).*
8. *Because the Learned Magistrate overlooked that Mr. Fokeer (witness No. 3) had during his testimony, given three contradicting versions to the very same question of "who decided on the salary" subject matter of counts 1, 2, 4 and 6 of the information.*
9. *Because the Learned Magistrate did not give reasons to justify why she preferred the versions of Mr. Fokeer (witness No. 3), who was himself interviewed under caution by ICAC in relation to this case over those of the Appellant."*

4. The appeal was resisted by the respondents.

5. With regard to grounds 5 and 6 which we propose to deal together, the case for the appellant rested on the trial Court's misdirection on two distinct elements under section 7(2) of the POCA which are closely connected namely "*he or a relative or associate of his*" and "*has a direct or indirect interest*".

6. Learned Counsel for the appellant laid emphasis upon the learned Magistrate's reference in her judgment to the presumptive provision under section 7(2) of the POCA in relation to count 1 which reads as follows:

*"There is a presumption that the accused made use of his position for a gratification where he took an action in relation to any matter in which a relative has a direct interest. The accused claimed that prior to the interview, he disclosed to Mr. Dumazel, who was also the Chairman of the Staff Committee that he was related to that candidate, but Mr. Dumazel told him that there was no conflict since he was only the Secretary and did not take part in the decision making.*

*However, this disclosure is not borne out in the minutes and the court finds that the presumption has not been rebutted”.*

7. Learned Counsel for the appellant submitted that the appellant did disclose that Mrs. R. D. Ramdany was his sister-in-law. He was not a decision maker for the Staff Committee and of the Board of Governors of the UTM. He also had no right to vote and he remained a ‘*facilitateur*’ with no decision-making power.
8. It is the case for the respondents that, on the basis of the evidence adduced on record it was clear that all the elements of the offence have been proved under counts 1, 2, 4 and 6 to the effect that the appellant made use of his position for the gratification of the successful candidates namely Mrs. Rani Devi Ramdhany, Miss Niveditah Salini Jeeloll, Mrs Anuradha Ramkurrun and Miss Virginie Labour. As such, the learned Magistrate’s misdirection was of no consequence to the present case as the evidence of guilt was overwhelming so that there was no need for the prosecution to avail itself of the presumption created by section 7(2) of the POCA. To support their contentions, they relied on the cases of **Jhurry v The ICAC** [\[2015 SCJ 258\]](#) and **N. Joomeer v The State** [\[2013 SCJ 413\]](#).
9. We have taken into consideration the evidence on record, the submissions of the learned Counsel appearing on both sides and the reasoning of the trial Court under grounds 5 and 6.
10. It is apposite at this juncture to reproduce Section 7 of the POCA which reads as follows:-
  - “(1) *Subject to subsection (3), any public official who makes use of his office or position for a gratification for himself or another person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.*
  - (2) *For the purposes of subsection (1), a public official shall be presumed, until the contrary is proved, to have made use of his office or position for a gratification where he has taken any decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.*
  - (3) *This section shall not apply to a public official who - (a) holds office in a public body as a representative of a body corporate which holds shares or interests in that public body; and (b) acts in that capacity in the interest of that body corporate.”*

11. A cursory reading of the above section shows that section 7(1) of the POCA creates the offence of Public Official using his office for gratification, setting out its elements. Section 7(2) creates the evidential presumption and section 7(3) creates the exemptions.
12. The appellant was being prosecuted for the offence under section 7(1) of the POCA. The prosecution bore the burden to establish the following elements of the offence with which he stood charged, namely, that the accused:
  - (i) was a public official;
  - (ii) made use of his office or his position;
  - (iii) so acted for a gratification for himself or another person.
13. The learned Magistrate after a thorough analysis of the evidence on record, found that it had been clearly established all the elements under section 7(1) of the POCA namely that the appellant as the Registrar of the UTM was a public official given that the UTM was a statutory body set up under the UTM Act. She also found on the basis of the evidence on record that he wilfully made use of his position and offered to Mrs Rani Devi Ramdany (Count 1), Miss Niveditah Salini Jeeloll (Count 2), Mrs Anuradha Ramkurrun (Count 4) and Miss Virginie Labour (Count 6) increments without the approval of the Staff Committee nor the Board of Governors of the UTM.
14. The contention of the appellant was that the learned Magistrate erred in law in not finding that the element of "*he, or a relative or associate of his*" and that of "*has a direct or indirect interest*" under section 7(2) of the POCA had not been proven in relation to counts 1, 2, 4 and 6 of the information.
15. We are of the view that the learned Magistrate erred when she made reference to section 7(2) of the POCA in her judgment inasmuch as the heading of the information clearly alluded to section 7(1) of the POCA. Additionally, it is of an utmost importance to consider section 2 of the POCA under which '*relative*' is defined as follows:-

*"relative", in relation to a person, means –*

  - (a) *a spouse or conjugal partner of that person;*
  - (b) *a brother or sister of that person;*
  - (c) *a brother or sister of the spouse of that person; or*
  - (d) *any lineal ascendant or descendant of that person."*
16. The evidence adduced by SI Doman (witness No.1) showed that Mrs Rani Devi Ramdhany was civilly married to the appellant's brother. Although in common parlance

she was the sister-in-law of the appellant, Mrs Rani Devi Ramdany did not come within the purview of the strict legal definition of 'relative' under section 2 of the POCA.

17. For the presumption under section 7(2) of the POCA 2002 to be operative, the appellant had to make use of his office or position for a gratification, "*where he has taken any decision or action in relation to any matter which he, or a relative or associate of his' and has 'a direct or indirect interest'*". In the present case, as rightly pointed out by learned Counsel for the respondents, there was no need to make use of the presumption under section 7(2) which was merely an evidential presumptive provision and did not create additional ingredients for the offence of '*using his office for gratification*' or the fact that successful candidates were '*relatives*' or '*associates*' vide **Parayag v ICAC [2011 SCJ 309]**.

18. On this score, we find it useful to cite the following passage in the case of **Joomeer (supra)**, which provides that:-

*"It is quite clear from the above that the section that creates the offence is section 7(1) of the Act. Section 7(2) is only an evidential section. It creates a presumption. But the presumption operates not in all the cases falling under the purview of section 7(1) but only in those situations where the public official "has taken [a] decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.*

*As such, where the decision relates to a relative or an associate, the gratification is presumed. That makes good sense inasmuch as, it can be assumed as a general rule that relatives or associates will have a common interest in a decision. The presumption in the matter is only rebuttable. Kith and kin by nature are not necessarily kith and kin by nurture. Examples are too many today in this age of material pursuit."* (underlining is ours)

19. We find it also relevant to refer to the dictum in the case of **Jhurry (supra)**:-

*"But the presumption created under section 7(2) is not being relied upon specifically by the prosecution in the present matter in order to prove its case against the appellant although the fact that the appellant had taken a decision in respect of a relative, as defined in **section 2 of the Act**, in respect of counts 1, 2 and 3 cannot be challenged since they all involved an offer of employment to a son of the appellant.*

*What is significant to retain therefore is that, independently of the application of the statutory presumption under section 7(2) of the Act, the evidence led by the prosecution had under each case established beyond reasonable doubt all the constitutive elements of an offence under **section 7(1) of the Act**— namely that the appellant, as a public official, had made an unlawful use of his office*

*as chairperson of SILWF committee, for the gratification of another person by offering employment to that person. The prosecution has been able to discharge on its own the burden of proving beyond reasonable doubt all the constitutive elements of the charge against the appellant under section 7(1) without praying in aid the presumption prescribed under section 7(2). The prosecution has indeed not invoked the presumption as is evidenced by the constitutive elements and particulars set out in each count of the information.*  
(underlining is ours)

20. We therefore find that the presumptive elements referred to by the appellant under section 7(2) of the POCA need not be averred or proved as the prosecution had adduced sufficient evidence of guilt against the appellant under section 7(1) of the POCA, thus not necessitating the use of the presumption under section 7(2) of the POCA. The misdirection of the learned Magistrate in relation to the above section was therefore of no consequence to the charges levelled against the appellant under counts 1, 2, 4 and 6 of the information.
21. Grounds 5 and 6 therefore fail.
22. Grounds 7, 8 and 9 will be taken together as they challenge the credibility of Mr. Fokeer (witness No.3). Learned Counsel for appellant submitted it was not safe for the Court to convict the appellant on the evidence of Mr. Fokeer (who was the Director General of the UTM until year 2013 but he has now retired). The Court failed to direct its mind that the said witness No.3 was a potential suspect and tainted with suspicion. He gave his statements under warning, and same might be equated to the evidence of a potential accomplice. The Court had a legal duty to give itself a warning as to the nature of the evidence it was acting upon, before finding counts 1, 2, 4 and 6 proved.
23. We wish to observe at the outset that true it is that the statements of Mr. Fokeer were recorded under warning, but the Court was duty bound to administer herself the caution if the evidence on record revealed that Mr. Fokeer was a potential accomplice in the present case. The learned Magistrate did not consider the evidence of Mr. Fokeer as being one which should be treated with caution given that his statement had been recorded under caution and we find that she did not err on this score as there was not an iota of evidence as to the fact that he was an accomplice in the present matter. Mr. Fokeer was at all material times one of the three members of the Interviewing Panel and Staff Committee and he also sat at the Board of Governors. The minutes of proceedings of the Staff Committee produced in Court as Document D, made no

mention of any salary scale purported to have been discussed or recommended. Document E purported to the minutes of the Board of Governors and again, no mention was made of any salary.

24. According to the submissions of respondent No.1, Mr. Fokeer was consistent throughout his evidence in Court to the fact that salaries were not discussed during the interview. Mr. Fokeer stated in Court that, when a salary is higher than that of the entry point in the salary scale offered, the Registrar should ask advice from the Ministry of Civil Service Affairs as to what should be the actual salary to be given to that particular candidate. He added that the higher salary is decided by the Ministry of Civil Service Affairs and is then communicated to the Staff Committee and the Board of Governors.
  
25. It is noteworthy also that the learned Magistrate did not rely on the sole testimony of Mr. Fokeer when taking her decision. She also considered the evidence of Mr Chutturdharry, the Assistant Registrar who *'also maintained that a new recruit must be offered a salary which is at the entry point as per the PRB scale, unless there is a decision otherwise from the Board level and which the Registrar has imperatively to implement'* as giving credence to the version of Mr. Fokeer.
  
26. Furthermore, she also analysed thoroughly the minutes of proceedings of the Board of Governors and that of the Staff Committee which also supported the version of Mr. Fokeer. She found that no mention was made to the minutes of proceedings of the Staff Committee (Document D) and that of the Board of Governors (Document E) of any scale purported to have been discussed or recommended. She rightly observed in her judgment *'There is normally a presumption of regularity. Since the correctness of the minutes of the meeting was not challenged, the court can safely say that it has not been rebutted. In the teeth of the minutes of the Staff Committee coupled with the testimony of the Mr Fokeer and Mr Chutturdharry, the court can conclude that there was no discussion of any derogation from the lowest salary entry point as recommended by the PRB 2008.'* (underlining is ours)
  
27. We therefore fully endorse the finding of the learned Magistrate that the evidence of witness Fokeer tallied with the version of Mr Chutturdharry (witness No. 2) and the documentary evidence, namely, the minutes of proceedings of both the Staff Committee and the Board of Governors adduced as evidence before the lower Court (Documents D and E respectively).

28. Ground 7 relates to the testimony of Mr. Fokeer which contained numerous serious inconsistencies that were in direct contradiction with the testimony of (i) Ms Chan Sin (witness No.14) who was another witness for prosecution, and (ii) Mrs Sudoollah (witness for the defence).
29. We have duly considered the arguments of the appellant's counsel on this issue. The learned Magistrate bore in mind that Ms Chan Sin (witness No.14) admitted under cross examination that during her interview, one of the interviewers asked her about the salary she was expecting to receive. However, her findings cannot be faulted when she came to the conclusion that *"It cannot be concluded therefrom that all the interviewers discussed the salary with the candidates. Now, even if salary was discussed at the level of the interview, being given that the PRB 2008 (Document U) allows for a negotiable point of entry, salary was not made a live issue during the Staff Committee."* As such, the learned Magistrate rightly considered that even if one of the interviewers mentioned the expected salary to Ms Chan Sin, the minutes of proceedings of the Staff Committee and the Board of Governors showed that no decision was taken as to salary increments.
30. With regard to the evidence of Mrs. Sadoollah, she deposed as regards the negotiable salaries on the PRB and averred that *"the salary of a contract officer is determined by the PRB. Sometimes, PRB gives salary in a given range. Then, it can be negotiated within the range given by the PRB."* However, under cross-examination we wish to point out that Mrs. Sadoollah simply conceded that she would not be able to answer questions on how statutory bodies (like the UTM) would regulate their financial affairs.
31. We are of the view that the learned Magistrate correctly assessed the version of Mr. Fokeer as a witness of truth and observed that Mr. Fokeer explicitly explained the procedures and was adamant that any derogation from the entry point which was prescribed, had to be taken to the Ministry of Civil Service Affairs for their decision which was thereafter submitted to the Staff Committee and the Board of Governors for approval. Since, the said procedure had not been followed, therefore the issue did not arise. She then found in relation to the testimony of Mr. Fokeer that *"The Court has no qualm to accept his version. His involvement in the recruitment process indicates that he was well aware of the steps to be taken before there was a departure from the minimum salary entry point."*



32. In view of the above findings of the learned Magistrate, we do not therefore propose to disturb the trier of fact's discretion in her assessment of the testimony of Mr. Fokeer (witness No.3) *vide* **Moosun A. D v P. Radhay** [\[1996 SCJ 103\]](#).
33. We find no merit in grounds 7, 8 and 9 as well.
34. For all the reasons set out above, we dismiss the present appeal with costs.

**R. D. Dabee**  
Judge

**M. E. S. J. Moutou-Leckning**  
Judge

**06 September 2024**

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**Judgment delivered by Hon. M. E. S. J. Moutou-Leckning, Judge**

**For the Appellant : Mr R. Rutnah, of Counsel**  
**Mr K. Bokhoree, Attorney at Law**

**For Respondent No.1 : Mr T. Naga, of Counsel**  
**Ms D. Nawjee, Attorney at Law**

**For Respondent Nos.2 & 3 : Mr M. Armoogum, Ag.Principal State Counsel**  
**Mrs D. Dabeesing Ramlugan, Principal State Attorney**